In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, A CORPORATION, PETITIONER

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

Because both petitioner and the District Court have relied substantially upon the past administrative action with respect to the issue involved in this case, we deem it appropriate to file this statement on behalf of the present Administrator.

While the administrative background on the question of underground travel in the bituminous coal industry differs from that in the iron ore industry, we believe that the Circuit Court of Appeals correctly concluded that this Court's

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decision in *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local,* 321 U. S. 590, cannot be distinguished in principle from the case at bar. The majority opinion, as we read it, announces the principle that if the character of the activity as work or employment is clear, customs or agreements are immaterial and incapable of removing the activity from the scope of the Act.

Petitioner, and the opinion of the District Court below, seek to distinguish the two cases on the ground, *inter alia,* that the Administrator of the Wage and Hour Division has "found essential distinctions between the facts of the two respective industries in relation to underground travel" (Pet. p. 24). This reference is to the statements of enforcement policy made by former Administrator Philip B. Fleming in 1940 regarding underground travel in the bituminous coal and in the metal mines respectively. With respect to the bituminous coal industry, he announced that in carrying out his enforcement duties he "would accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining," and that, in view of the prevailing customs and practices in the bituminous coal mining industry which were supported by a long history of bona fide collective bargaining, the

practice of computing working time on a "face to face" basis in that industry would not be regarded as unreasonable (Plfs. Ex. No. 21, R. 673, 675). With respect to metal mining, however, he announced that working time should be computed on a "portal to portal" basis since there was no comparable record in the metal mines either in regard to collective bargaining or in regard to uniformity of practices or customs (Plfs. Ex. 23, R. 692, 694).

At the time Administrator Fleming announced these policies there were in existence no authoritative court decisions establishing the legal principles which should control his interpretation. In distinguishing between the bituminous coal mining situation and the metal mining situation he was guided not by legal principles but by his reluctance to disturb prevailing practices which both the labor union and the operators were earnestly urging him to leave undisturbed. The majority opinion of this Court in the *Tennessee Coal* case, made it clear that the grounds on which Administrator Fleming drew his distinction were untenable in law in view of the character of underground travel as work. Moreover, at the present time, and for more than a year now, the administrative enforcement policy has not been supported by practice or contract, since the bituminous coal mines have been operating under

contracts providing for payment of wages on the "portal to portal" basis.

Apart from the facts relating to custom and contract, there is no basis for legal distinction between underground travel in the two industries. This is not a borderline case "where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment" (321 U. S. at 603). As the Circuit Court of Appeals pointed out, "the record leaves no doubt that travel to the working face in a coal mine is substantially the same sort of thing as travel to the working face in an iron mine" (R. 889). The underground travel in the bituminous coal mines, like that in the iron mines, is a "fossorial activity bearing all the indicia of hard labor" (321 U. S. at 599), and its character as work is no less clear in the former than in the latter mines. This is evident from the description of the underground travel in the findings of fact of the District Court in the instant case (R. 544–548), despite the District Judge's conclusory statement that "such painful and burdensome conditions as those described in the iron ore mines" were not found in petitioner's mines (R. 567). This conclusion, as the Circuit Court of Appeals accurately appraised it, does not mean that the basic facts of the two cases are substantially different but only that the "trial judges have looked

at them in a different way" (R. 891). The Circuit Court of Appeals correctly pointed out that the basic facts were the same and the District Judge's conclusion was simply attributable to a difference in views as to the law or its application (*ibid*).

Since, in the instant case the facts relating to underground travel, as in the case of the iron ore mines, "leave no uncertainty as to its character as work," custom and contract may not control the computation of working hours under the statute (See 321 U. S. at 602–603).

The District Court in the instant case emphasized the fact that the Administrator, although invited by plaintiff to intervene in this action, did not participate, nor did he retract or modify the ruling of former Administrator Fleming (R. 559). In the brief filed on behalf of the Administrator in the *Tennessee Coal, Iron & R. R. Co.* case, we pointed out that the inaction on the part of the present Administrator was "attributable, not to continued approval under present circumstances of the previously announced coal policy, but to his reluctance to do or say anything which might be construed as an attempt to influence the present litigation" (Br. p. 62). At the time this case was tried the *Tennessee Co.* case had not yet been decided by this Court.

In any event, the Government is of opinion that the decision of the Circuit Court of Appeals is correct.

Respectfully submitted.

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Solicitor General.

DOUGLAS B. MACGIS,
Solicitor of Labor.

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